

Claimant alleged a series of repetitive traumas beginning October 18, 2005, and continuing through her employment with respondent. The ALJ found claimant sustained

a 66.5 percent work disability based upon a 40.7 percent task loss and a 100 percent wage loss.¹

Respondent requests review of the nature and extent of disability. Respondent argues that claimant failed to meet her burden of proof that she suffered any permanent impairment as a result of her work-related injury. In the alternative, respondent argues if claimant is entitled to a work disability a wage should be imputed because she failed to make a good faith effort to locate employment.

Conversely, claimant argues that she met her burden of proof to establish that she suffered permanent impairment to her back as a result of her work-related injury. And she made a good faith job search which entitles her to a 100 percent wage loss for that portion of the work disability formula.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

A brief recitation of the history of this claim is necessary. An Award was entered on this claim on September 15, 2008. Upon review, the Board concluded the ALJ had not considered the entire evidentiary record because a joint stipulation filed by the parties regarding a series of letters from Dr. Pat D. Do was not included in the administrative file nor listed as part of the evidentiary record in the ALJ's Award. Consequently, the Board, in an Order dated December 30, 2008, remanded the case to the ALJ for consideration of the entire evidentiary record.²

ALJ Klein issued another award on March 6, 2009, which is the subject of this review. As previously noted, this second award is replete with errors. At oral argument, the parties agreed the work disability calculation was incorrect and the computation paragraph utilized an incorrect average weekly wage as well as an incorrect percentage of work disability. Plus, the calculation failed to include temporary total disability compensation which the parties discussed at the regular hearing.

¹ A 40.7 percent task loss averaged with a 100 percent wage loss would correctly calculate to a 70.35 percent work disability.

² The facsimile which the Board requested from the parties at oral argument has been included as part of the evidentiary record. The facsimile copy includes the stipulation and attached letters from Dr. Do dated November 23, 2006, April 3, 2007, and April 5, 2007, as well as the Independent Medical Examination Report filed stamped December 26, 2006.

At the regular hearing, on December 27, 2007, the parties stipulated that temporary total disability compensation in a sum of \$2,142.46 was paid. It was additionally noted that medical compensation in the sum of \$11,552.22 was also paid. Initially, these amounts were attributed to a different docket that was tried with the instant case. But later it was noted these amounts were paid in the instant docketed case.³

Finally, the ALJ's Award approved the claimant's attorney fee but initially there was no attorney fee contract located in the administrative file. Such contract has now been filed and must be approved by the Director.⁴

Turning to the facts of the instant case, Delores Bishop began working for respondent in June 2002. Her last day worked was June 26, 2006. Claimant testified how her accident on October 18, 2005, occurred:

Well, we had a pallet back up close to the candy line, totes of candy. I was in close quarters. I stepped in there, picked up a tote which was heavy and twisted, you know, come around with it to empty it onto the line. That is when I injured my back which I thought I had pulled a muscle.⁵

Claimant notified her supervisor that she had pulled a muscle in her back. The next day she sought treatment with a chiropractor, Dr. Bunch, in Iola, Kansas. Respondent referred claimant to the company doctor. Dr. Singer ordered an x-ray and a MRI. It was determined that claimant had a compression fracture in her back at L-1. Claimant was later sent to Dr. Coles for additional treatment and was placed in a full back brace. Claimant was released to light-duty work the latter part of December 2005 and remained on light duty until June 2006.

Dr. Ciccarelli released claimant back to full duty on June 12, 2006, but claimant did not return to work. She was also receiving treatment for her back from her personal physician and he would not release her to full-duty work. She then took a leave of absence from June to October 1, 2006. Claimant testified that respondent needed a release with no restrictions in order for her to return to work. But her leave of absence expired before claimant received a release from her physician and claimant was unable to return to work with respondent.

Claimant currently complains of pain radiating down from the hip to the outside of her right foot. Claimant further testified she did not have any low back problems before this accident. She noted that she had sought chiropractic treatment a few times for general

³ R.H. Trans. at 7.

⁴ See K.S.A. 44-536(b).

⁵ R.H. Trans. at 11.

back pain. But she testified that she had never been diagnosed with a back condition, never received restrictions for a low back condition and never received any permanent impairment rating for a low back condition.

Dr. Edward J. Prostic, board certified orthopedic surgeon, examined and evaluated claimant on January 30, 2006, at her attorney's request. The doctor reviewed claimant's previous medical records and took a medical history. As a result of the examination, Dr. Prostic diagnosed claimant as having an acute compression fracture of L1 and an aggravation of preexisting degenerative disk disease with development of right S1 radiculopathy.

Dr. John Ciccarelli, board certified orthopedic surgeon, performed a physical examination and evaluated claimant on May 16, 2006, due to complaints of low back, leg and foot pain. The doctor, at respondent's attorney's request, reviewed claimant's medical records and conducted a physical examination. Dr. Ciccarelli ordered a repeat MRI to check the healing progress of her fracture. Claimant returned for a follow-up visit on June 8, 2006. Dr. Ciccarelli diagnosed claimant as having a compression fracture of the L1 vertebral body that was healed and continued with ongoing back pain and radicular complaints due to her preexisting multi-level degenerative arthritic changes in her spine. The doctor opined that claimant did not need any restrictions with regard to the fracture.

Dr. Ciccarelli testified:

Q. At this point, are you able to rule out any aggravation within a reasonable degree of medical certainty to the pre-existing condition from her work-related injury?

A. Based on my opinion in reviewing her records and past complaints and extensive work-up she's had for it, as well as ongoing treatment before that, I feel in my opinion, yes, I do feel that she had ongoing problems even preceding this to the point that she was engaged in ongoing treatment for it.

I don't feel that I can say with any degree of certainty that her need for treatment now relates to this specific episode, other than her fracture which she sustained. But I cannot state with any degree of certainty that her ongoing complaints that seem to be very similar, if not identical, to her past treatment is necessarily any worse or more symptomatic for her based on my discussions with her.

Q. Okay. And I appreciate that, Doctor, my question is a little bit different. Which is can you rule out aggravation to her pre-existing condition to her spine, can you rule out any work-related aggravation within a reasonable degree of probability?

A. Yes, based on my opinion for those previous reasons, I believe I can.⁶

Claimant was examined and evaluated by Dr. Pat Do on September 11, 2006, pursuant to a court-ordered independent medical examination. Dr. Do noted that claimant suffered a compression fracture of L1 in her lumbar spine. Dr. Do specifically determined that claimant's complaints were a direct result of her injuries suffered while working for respondent. The doctor noted that claimant had actually aggravated her preexisting condition.

Because Dr. Do had indicated that claimant had no prior back problems, the respondent's counsel sent the doctor a letter to clarify his opinion. In a letter dated November 23, 2006, Dr. Do responded and concluded that claimant's current back condition was not related to her work injury. Dr. Do stated in pertinent part:

After thoroughly reviewing medical records again that had been provided for the original IME, I did discover that I was in error in documenting that the patient had no prior back problems. It is documented in the medical records that she did have some previous problems. On the IME questionnaire, she had documented that she did not have any prior back problems, but it is clear after reviewing the medical records that she had prior back problems up to nearly five years previously to the date of injury and as recent as a few months prior to the date of injury she was being treated for back pain. Based on this fact, it is my opinion within a reasonable degree of medical certainty that claimant's prior back problems are the basis for her need of the ongoing treatment rather than as a result of the work injury dated 09/11/06.⁷

The claimant's attorney then corresponded with Dr. Do who explained in a letter to claimant's attorney, dated April 3, 2007, that he changed his initial opinion because he reviewed medical records regarding claimant's preexisting back condition. The doctor then noted that it was difficult to determine what is work related and what is preexisting and that claimant had some of both. But the doctor then immediately followed this response with a letter to claimant's attorney dated April 5, 2007, which again noted that claimant's need for treatment for her back pain was not related to her work injury. The letter noted in pertinent part:

However, later on, I received medical records from Mr. Brendan Webb, which I reviewed, which demonstrated that Ms. Bishop, even three or four weeks prior to her alleged injury was being treated for the same complaints and same symptoms.

⁶ Ciccarelli Depo. at 16-17.

⁷ Dr. Do's independent medical evaluation contained the correct accident date of October 18, 2005 and the listing of 09/11/06 in this letter appears to be a typographical error.

Because of the duration within three or four weeks, often times doctors will see patients in followup for every three or four weeks for the same problem, I feel her need for treatment for her back pain is not causally related to her work injury.⁸

On May 8, 2007, claimant was again physically examined and evaluated by Dr. Edward Prostic. The doctor opined that claimant had poor range of motion of her lumbar spine because she could only reach forward several inches above her knees as well as poor extension and lateral bend to each side. Claimant also had anterior crepitus of the right knee. Dr. Prostic ordered x-rays of the right knee which revealed spurring about the superior right patella, lateral tilting of the patella with lateral facet overhang, and signs of degeneration of the anterior compartment of the right knee. Dr. Prostic testified:

It continued to be my opinion that she had sustained an acute compression fracture of L1 that was healed by the time I saw her, May 8th, 2007. It continued to be my opinion that she sustained aggravation of pre-existing degenerative disk disease in the low back with development of right S1 radiculopathy. And at the right knee, she had patellofemoral dysfunction with early patellofemoral arthritis.⁹

Based on the *AMA Guides*¹⁰, Dr. Prostic rated claimant's right knee at 15 percent permanent partial impairment to the lower extremity and a 15 percent whole body impairment due to her lumbar spine. These impairments combine for a 20 percent whole body functional impairment. The doctor restricted claimant to sedentary work with the ability to change position as needed.

On cross-examination, Dr. Prostic agreed that he was not aware claimant had preexisting back complaints and treatment for that back condition. And the doctor further agreed that it was inconsistent that claimant did not tell him about her prior back complaints.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹¹ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."¹² Medical evidence

⁸ Dr. Do's letter dated April 5, 2007.

⁹ Prostic Depo. at 9.

¹⁰ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

¹¹ K.S.A. 2006 Supp. 44-501(a).

¹² K.S.A. 2006 Supp. 44-508(g).

is not essential to the establishment of the existence, nature and extent of an injured worker's disability.¹³ Furthermore, the finder of fact is free to consider all the evidence and decide for itself the percentage of disability.¹⁴

The doctors agreed that as a result of her work-related accident the claimant suffered a compression fracture which healed. Dr. Prostic concluded claimant also suffered a permanent aggravation of her preexisting degenerative disk disease. But Dr. Prostic did not have a complete history of claimant's preexisting medical condition when he initially rated claimant's condition. Conversely, Drs. Ciccarelli and Do concluded claimant did not suffer permanent aggravation of her preexisting degenerative disk disease as a result of her work-related injury based upon her preexisting medical record. The Board finds the opinion of Dr. Do, the court ordered independent medical examiner, more persuasive in this instance. The essence of Dr. Do's report and letters to the attorneys was that claimant suffered a temporary aggravation of her preexisting degenerative disk disease but that her continued need for treatment was not caused by the work-related accident. Stated another way, after her compression fracture healed the claimant's degenerative disk disease problems returned to the base level that had existed before the accident.

The Board finds claimant has met her burden of proof to establish that she suffered a compression fracture to her back as a result of the work-related accident as well as a temporary aggravation of her preexisting degenerative disk disease. Consequently, she is entitled to the temporary total disability compensation and medical compensation for the treatment provided. And the Board further finds, based upon the opinions of Drs. Ciccarelli and Do, that claimant failed to meet her burden of proof that she suffered any permanent impairment as a result of her work-related accident.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Thomas Klein dated March 6, 2009, is modified to reflect claimant is entitled to the stipulated temporary total disability and medical compensation paid on this claim but is denied permanent partial disability compensation in accordance with the foregoing.

IT IS SO ORDERED.

¹³ *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

¹⁴ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258, (1999).

Dated this _____ day of January 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick C. Smith, Attorney for Claimant
Brenden W. Webb, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge